Crown Zellerbach Corporation *and* Association of Western Pulp and Paper Workers, Local 711 *and* Barbara Gardner

Printing Specialties and Paper Products Union, District Council No. 2, International Printing and Graphic Communications Union, AFL-CIO *and* Association of Western Pulp and Paper Workers, Local 711. Cases 21-CA-18080, 21-CA-18605, 21-CA-19926, and 21-CB-7182

4 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

On 15 October 1981 Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief; the Respondent Employer filed exceptions and a brief in support of the Administrative Law Judge's Decision; the Respondent Union filed cross-exceptions and a brief in support thereof, and in answer to the General Counsel's brief; and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge recommended that the complaint in this proceeding be dismissed in its entirety. We agree with his recommendation to dismiss and his reasons therefor. However, in view of various assertions made by our dissenting colleague, some brief further comment is necessary concerning the basis for our agreement with the Administrative Law Judge that the 1979 agreement between Respondent Employer and Respondent Printing Specialties Union (PSU) over bonus payments did not violate the Act.

Briefly, the facts show that on 9 September 1978 all 220 unit employees at Respondent Employer's Los Angeles plant engaged in a strike in support of the contract demands of their then bargaining representative, Association of Western Pulp and Paper Workers, Local 711 (AWPPW). Shortly thereafter, however, employees began to cross the picket lines and, when the strike ended on 26 March 1979, 133 of the 220 unit employees had already returned to work. Of the 87 employees who were on strike for its duration, 24 were then recalled between March and August 1979; 47 were placed on a preferential hire list but were never recalled before the plant closed in January 1980; and the remaining 16 either quit or were fired for cause.

During the strike, a rival union, Respondent PSU, filed a representation petition seeking certification as the bargaining representative of the Los Angeles plant employees. After winning the representation election, Respondent PSU was certified, on 5 December 1979, to represent the Los Angeles plant employees. Thereafter, on 26 December 1979, Respondent Employer and Respondent PSU executed a collective-bargaining agreement which provided, *inter alia*, for a bonus payment to employees who were actively employed on 27 December (the ratification date of the collective-bargaining agreement) based upon the number of hours worked by those employees during the period from 1 October 1978 through 30 September 1979.

Our dissenting colleague, in agreement with the General Counsel, contends that Respondents' choice of the 1978-79 time period for computing the bonus violated the Act since that period included time when certain employees, now represented by Respondent PSU, were not working because of their participation in the AWPPW strike, and since the employees who participated in the strike for its duration necessarily received less bonus than those who crossed the picket line and returned to work before the strike terminated. While the General Counsel further contends that the appropriate time period for any bonus computation was the year preceding that chosen by Respondents when *all* unit employees had worked, i.e., 1 October 1977 through 30 September 1978, our dissenting colleague notes only that a "different computation period" from the one chosen by the parties should have been used.

In rejecting the positions of the General Counsel and our dissenting colleague, we note initially that all employees struck in support of AWPPW's demands but that some returned sooner than others. The 133 employees who returned to work before the strike ended received a proportionate bonus payment and so did the 24 other employees who

[1] In affirming the Administrative Law Judge's findings, we note that in sec. I,B,2(a) of his Decision, he inadvertently mischaracterized the allegations of the complaint. We note that the complaint alleges that Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act and that Respondent Employer violated Sec. 8(a)(1), (2), and (3) of the Act by negotiating and implementing the 1979 bonus agreement covering the employees at the Los Angeles plant.

The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

remained on strike for its duration but who were then recalled to work by the ratification date of the contract. While the 47 employees who had remained on strike for its duration and whose names were placed on a preferential hiring list received no bonus, it is clear, as pointed out by the Administrative Law Judge, that even had Respondents negotiated a bonus arrangement with the 1977–78 time period, as urged by the General Counsel, the effect on these employees would not have been significantly different from the bonus arrangement which the dissent claims is unlawful. This is so because in order to be eligible for a bonus under either computation period an employee would have had to be on the active payroll *as of 27 December, the date that the governing collective-bargaining agreement was ratified.* This requirement was consistent with Respondent Employer's past negotiating precedent and was not alleged as unlawful at the hearing by the General Counsel. As found by the Administrative Law Judge, it was this requirement, rather than the bonus computation period, which resulted in no bonus being paid to the 47 strikers on the preferential hire list because they had not been reinstated as of 27 December.

Additionally, the record does not establish that Respondent PSU, in proposing and negotiating the bonus computation period, breached its statutory duty of fair representation. While Respondent PSU's negotiating committee, in drafting the bonus proposal, may have failed to consider consciously the effect that the bonus computation period would have on the 47 unreinstated strikers, this failure, standing alone, is in our view neither sufficient to warrant a finding that Respondent PSU breached its duty of fair representation nor sufficient to warrant the inference that Respondent PSU was motivated by a desire to punish these employees for having supported, for its duration, the strike of rival union AWPPW. This is especially true since, in selecting the disputed bonus computation period, Respondent PSU acted consistent with past bargaining precedent and out of a good-faith belief that the bonus proposal would benefit a significant majority of the unit employees, which, of course, it did. Moreover, as noted above, the provision in the bonus agreement which required that the bonus be paid only to current employees made whatever bonus computation period negotiated of no consequence to the 47 unreinstated strikers.[2]

The 1978–79 bonus computation period also appears consistent with past practice. The bonus computation period was historically keyed to the year immediately *prior* to the effective date of the new collective-bargaining agreement. Here that was the 1978–79 period chosen. The dissent emphasizes that, subsequent to the strike, Respondent Employer agreed to a bonus arrangement with AWPPW covering the employees at the North Portland, Oregon, and San Leandro, California, plants who also struck and that the bonus period there was computed on the basis of work performed between 1977–78 rather than on the year immediately preceding that collective-bargaining agreement. However, we note, as did the Administrative Law Judge, that the evidence establishes that, due to the strike, there were *no* employees employed at those plants for more than 6 months of the year immediately preceding the execution of the collective-bargaining agreement. Thus, the period of time agreed to by Respondent Employer and AWPPW represented merely a time when employees had worked a representative number of hours and, in our view, does not detract from the established past practice of negotiating a bonus period based on the number of hours worked by employees during the year immediately prior to the effective date of the new collective-bargaining agreement.

Further, the record also establishes that Respondent Employer had no reason to believe that Respondent PSU had proposed the bonus computation period from 1978 through 1979 for discriminatory or arbitrary reasons. Thus, Respondent Employer offered uncontroverted testimony that the time period proposed by Respondent PSU was "perfectly logical" since the proposal was in accordance with the past practice of computing bonus payments based upon the number of hours worked by employees during the year immediately preceding the ratification of the collective-bargaining agreement. Given that in the two or more years preceding the execution of the 1979 collective-bargaining agreement with Respondent PSU Respondent Employer had encountered substantial labor unrest, including the 6-1/2-month strike for which it had not fully recovered financially as of the date that it negotiated the agreement, the execution of the 1979 collective-bargaining agreement with Respondent PSU, which promised 3 years of labor peace, was, in the Administrative Law

[2] We recognize, as did the Administrative Law Judge, that Respondent PSU's reason for failing to consider the 47 unreinstated strikers who were on the preferential hire list when it proposed the bonus computation period was based on the union negotiating committee's assumption that, since these individuals were not currently employed and had not been employed for some time, they were not unit employees. However, in view of the overwhelming evidence noted above, we agree with the Administrative Law Judge that the Union's failure to consciously consider the effect that the bonus computation period would have on the unreinstated strikers did not convert its conduct into a breach of its duty of fair representation. Therefore, contrary to the dissent, we agree with the Administrative Law Judge's reference to *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974).

Judge's opinion, a legitimate and substantial business justification for accepting Respondent PSU's bonus computation period. And, contrary to the dissent, Respondent Employer offered other reasons for accepting Respondent PSU's bonus proposal. Thus, the record establishes that it was a profitable period for Respondent's Los Angeles plant in which Respondent wanted the employees to share and that the period chosen was consistent with the past practice of keying the period to the time immediately preceding agreement.

Further, unlike our dissenting colleague, we are not persuaded that, by negotiating the bonus computation period, Respondent PSU and Respondent Employer engaged in conduct which was "inherently destructive" of employees' Section 7 rights. Thus, as noted above, the 47 unreinstated strikers would have received no bonus under either Respondents' computation period or the computation period suggested by the General Counsel. And, while 24 reinstated strikers received a smaller bonus than those who had earlier crossed the picket line, they did share in the bonus. Nevertheless, the dissent argues that, by implementing the 1978–79 bonus computation period, Respondents engaged in conduct having the actual and foreseeable consequence of penalizing employees for supporting AWPPW's strike in a manner inherently destructive of employees' Section 7 rights. We reject that argument because it is clear to us that not every detriment which has some nexus to an employee's union activities is thereby automatically rendered an unfair labor practice.[3] In sum, we find nothing "inherently destructive" of employee rights in the use of the 1978–79 bonus computation period.

Further, in view of the evidence discussed above, we conclude that Respondents did not violate the Act, as alleged, and we adopt the Administratie Law Judge's conclusions to that effect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting in part:

Contrary to my colleagues, I would find that Respondent PSU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by proposing and thereafter agreeing to the implementation of a discriminatory retroactive bonus payment plan, and that Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by accepting and implementing the terms of the foregoing payment plan. I join my colleagues in dismissing the remaining allegations in the complaint.

The evidence establishes that on 9 September 1978 all unit employees at Respondent Employer's Los Angeles plant commenced a strike in support of the contract demands of their then bargaining representative, the Association of Western Pulp and Paper Workers, Local 711 (AWPPW).[4] By the conclusion of the strike on 26 March 1979, a majority of the 220 unit employees at the Los Angeles plant had crossed the picket line and returned to work. Of the employees who remained on strike for its duration, 24 ultimately were recalled between March and August 1979 and 47 others were placed on a preferential hiring list in accordance with statutory requirements.

During the aforementioned strike by AWPPW, Respondent PSU, a rival union, filed with the Board a petition seeking to represent Respondent Employer's Los Angeles plant employees. Respondent PSU was successful at the representation election and on 5 December 1979 was certified to represent the Los Angeles plant employees. In anticipation of collective-bargaining negotiations with Respondent Employer, Respondent PSU decided to include in its contract proposal a retroactive bonus payment to each eligible employee which was to be computed based on the hours worked by that employee during the period 1 October 1978 through 30 September 1979. According to the testimony of Gary Green, a member of Respondent PSU's negotiating committee, the foregoing computation period was sought because management had informed employees that the 1978–79 period had been a more profitable period than earlier months and because a majority of the employees currently employed had worked a substantial number of hours during the 1978–79 period. According to Green, Respondent PSU did not consider the 47 unreinstated strikers on the preferential hiring list to be bargaining unit employees and, therefore, did not consider their interests in formulating its proposal. Further, as with the 47 unreinstated strikers, it is evident that Respondent PSU was equally unconcerned with the interests of the 24 strikers reinstated after the conclusion of the strike who, because of their prolonged participation in the strike, were not among the "majority" of

[3] See, generally, *Ace Beverage Co.*, 253 NLRB 951 (1980); *Postal Service*, 261 NLRB 505 (1982); *Atlantic Creosoting Co.*, 242 NLRB 192 (1979); *Kennedy & Cohen of Georgia*, 218 NLRB 1175, 1176 (1975) (striker Paden).

[4] Unit employees at Respondent Employer's North Portland, Oregon, plant also participated in the strike.

employees who had worked a "substantial number of hours" between October 1978 and September 1979 and who, thereby, were to receive a significantly reduced bonus payment as compared to employees who had worked during the strike. The evidence further reveals that, after only 2 days of negotiations, Respondent reached agreement on a collective-bargaining agreement containing, *inter alia*, the bonus payment plan computed from the October 1978 to September 1979 period.

Although the Administrative Law Judge found that Respondent PSU was "hostile" toward AWPPW because of their rivalry for the allegiance of Respondent Employer's Los Angeles plant employees, as further evidenced by its attempts to persuade striking employees to cross AWPPW's picket line, the Administrative Law Judge found that Respondent PSU's failure to consider the interests of the former strikers during contract negotiations to be, at most, mere "negligence." Contrary to my colleagues, who have adopted the Administrative Law Judge's finding in this regard, I am convinced that the evidence overwhelmingly supports a finding that Respondent PSU's conduct toward the former AWPPW strike supporters violated the Act.

While a union enjoys a wide range of reasonableness in pursuit of its duties as collective-bargaining representative, it is required to treat fairly, impartially, and in good faith, *every* employee whom it represents, *Teamsters Local 860 (The Emporium)*, 236 NLRB 844 (1978), and may not sacrifice arbitrarily the interests of a minority group, *Teamsters Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616 (1975). It is evident that Respondent PSU has failed herein to meet those requirements. As demonstrated by the testimony of Green, Respondent PSU admittedly failed in any manner to consider the interests of the 47 unreinstated strikers. As to the 24 AWPPW strike supporters who were reinstated, the evidence is equally clear that Respondent PSU failed to represent their interests entirely and acted only in support of the interests of the "majority" of employees; i.e., those employees who crossed the picket line of rival union AWPPW. Thus, it is *only* the employees who crossed the AWPPW picket line who, in fact, worked a "substantial number of hours" during the 1978–79 period. The computation period utilized, therefore, was a form of favoritism to the detriment of the AWPPW supporters which, because of the impact on their affirmative right to strike, was inherently destructive of employees' Section 7 rights. Such conduct, therefore, restrained and coerced employees in the exercise of their statutory rights, and caused or attempted to cause Respondent Employer to discriminate against employees in violation of the Act.

Contrary to my colleagues, it is my view that this is not simply a case of mere negligence, such as that arising from inadvertent error, incompetence, or negligent mishandling of a representative function. Rather, we are presented with a union's affirmative pursuit of a specific contract proposal knowingly benefiting one group of employees to the obvious detriment of another group of employees who supported fully the strike efforts of a rival union. In this regard, I note that there is no evidence whatsoever indicating that Respondent PSU attempted to balance the interests of *all* employees by considering, for example, whether a different computation period would be more advantageous and equitable for employees as a *whole*. To the contrary, Green's testimony establishes beyond question that Respondent PSU was concerned *solely* with the interests of the "majority" of employees benefited by the 1978–79 computation period and not with the interests of the AWPPW strike supporters. As conceded by Respondent PSU in its brief to the Board, "there was never any discussion or proposal by anyone that a different time period would be used." Accordingly, the record amply demonstrates Respondent PSU's overt favoritism toward one group of employees to the utter disregard of the interests of a rival union's strike supporters. In these circumstances, the Administrative Law Judge's reliance upon *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974), wherein a union advertently failed to file a meritorious grievance in a timely manner, is totally misplaced.

My colleagues concede that, in proposing the bonus computation plan, Respondent PSU "may have failed to consider" the effect of the plan, as proposed, on the unreinstated strikers in the bargaining unit. They assert, however, that this application of Respondent PSU's representation obligation was lawful because it benefited "a significant majority of the unit employees," i.e., those who did not support fully the strike of rival union AWPPW. As my colleagues, of course, are fully aware, Section 9(a) of the Act provides specifically that a collective-bargaining representative shall represent "*all* the employees in such unit" (emphasis supplied). Nowhere in Section 9(a) do I find a proviso confining a union's representation obligation to a "significant majority of the unit employees." Accordingly, I fail to see how it can be said that a union has satisfied its statutory obligations when admittedly it never has bothered even to consider the interests of numerous bargaining unit employees and is concerned *only* with the interests

of the "majority" of employees, i.e., those whom it solicited and encouraged to cross the picket line of a rival union. In these circumstances, it is evident that we are not faced with a legitimate trade-off of competing employee interests necessarily within the broad discretion enjoyed by a bargaining representative. Such a trade-off, by definition, assumes that legitimate employee interests have been balanced with other legitimate employee interests. Where, as here, only *one* interest is considered by a bargaining representative, the interests of the remaining bargaining unit members obviously have been bypassed totally. As virtually conceded by PSU negotiating committee member Green, the effect literally is the expulsion of bargaining unit members from the bargaining unit. This is the very essence of arbitrary conduct.

Further, it is clear that by implementing the 1978–79 period as a measure for computing employees' bonuses, Respondent Employer, like Respondent PSU, engaged in conduct having the actual and foreseeable consequence of penalizing employees for supporting AWPPW for the duration of the strike in a manner inherently destructive of employees' Section 7 rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). While Respondent Employer contends that the implementation of this period was undertaken pursuant to an overriding and substantial business justification because the execution of the 1979 bargaining agreement promised 3 years of labor peace, this, standing alone, does not render lawful Respondent Employer's acquiescence in Respondent PSU's unlawful proposal. As an initial matter, such a finding effectively would shield a party to a contract from the legal consequence of its assent to *any* contract provision, even the most egregiously unlawful, and cannot be considered a "substantial business justification" herein within the meaning of *Great Dane*. Secondly, Respondent Employer has made no showing whatsoever that exploration of a different computation period which did not effectively discriminate against the AWPPW supporters likely would have resulted in continued labor unrest or necessarily would have impeded the execution of a bargaining agreement. Further, Respondent Employer has not demonstrated that the use of a different computation period could not have fully and equally satisfied its purported desire to share with all employees its business profits.

Finally, Respondents contend that their conduct was lawful because the use of the 1978–79 computation period was consistent with established practice conferring upon Respondent Employer's employees a bonus based on work performed during the year immediately preceding the execution of a bargaining agreement. I note, however, that with respect to Respondent Employer's North Portland, Oregon, employees, who also struck Respondent Employer in 1978–79, the bonus period implemented after the strike was computed on the basis of work performed between 1977–78 and *not* on the basis of the year immediately preceding the contract, 1978–79. Accordingly, it is clear that the strike had already altered, prior to the parties' execution of the 1979 bargaining agreement, established practices which otherwise may have existed. In these circumstances, it is my view that both Respondent Employer and Respondent PSU share responsibility for the unlawful implementation of the 1978–79 bonus computation period and, therefore, each has violated the Act.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: This consolidated proceeding is based on unfair labor practice charges filed against Crown Zellerbach Corporation, herein Respondent Employer, and Printing Specialties and Paper Products Union, District Council No. 2, International Printing and Graphic Communications Union, AFL–CIO, herein Respondent Union, by the Association of Western Pulp and Paper Workers, Local 711, herein AWPPW, and Barbara Gardner. The charges against Respondent Employer were filed by AWPPW in Cases 21–CA–18080 and 21–CA–18605 on August 10, 1979, and January 21, 1980, respectively, and by Barbara Gardner in Case 21–CA–19926 on January 26, 1981.[1] The charge against Respondent Union in Case 21–CB–7182 was filed by AWPPW January 21, 1980. On February 27, 1981, the Regional Director for Region 21 of the National Labor Relations Board, on behalf of the Board's General Counsel, issued a second amended consolidated complaint in the aforesaid cases alleging that Respondent Employer violated Section 8(a)(1), (2), and (3) Respondent Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, herein called the Act. The complaint alleges that by proposing to Respondent Employer that employees be paid retroactive pay, based on hours they worked during a specified time period rather than another specified time period, Respondent Union violated the Act because said wage proposal was made in violation of the Respondent Union's statutory duty of fair representation and/or for an improper motive of penalizing employees who supported AWPPW, a rival labor organization. The complaint alleges that Respondent Employer violated the Act by accepting and implementing the Respondent Union's illegal retroactive wage proposal, by discharging employee Lopez because of his activity on behalf of AWPPW, and by refusing to make severance payments to a group of unreinstated economic strikers when it closed its plant.

[1] The charge in Case 21–CA–1080 was amended September 10 and 26, 1979.

Respondents filed timely answers to the complaint denying the commission of the alleged unfair labor practices.[2] I conducted a hearing in this matter on March 18–19, 1981.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Discharge of Daniel Lopez*

1. The evidence

On March 9, 1978, AWPPW was certified by the National Labor Relations Board as the collective-bargaining representative of the production and maintenance employees employed by Respondent Employer at its Los Angeles, California, and North Portland, Oregon, flexible packaging plants. Shortly thereafter AWPPW commenced negotiations with Respondent Employer for a collective-bargaining agreement. They were unable to negotiate an agreement and on September 9, 1978, the employees ceased work and went on strike in support of AWPPW's contract demands. The strike lasted until March 26, 1979.

Daniel Lopez at the time of the strike had been employed for about 20 years at the Los Angeles plant. He supported the strike for its duration, walked the picket line, and was one of the AWPPW's wage delegates who negotiated with Respondent Employer's representatives during the strike. Don Irwin at the time of the strike had been employed for about 12 years at the Los Angeles plant. He returned to work after initially supporting the strike. Lopez did not like the fact that a number of the employees, including Irwin, were not supporting the strike. He showed his dislike by calling them "scabs" as they went to work across the picket line.

On February 9, 1979, in the afternoon, Lopez and another striker, Ralph Sarabia, after having a few beers at a bar and in a parking lot near the Los Angeles plant, went to a liquor store near the plant to buy some more beer. Irwin, whose work shift had just ended, arrived at the store immediately after Lopez and Sarabia. As Irwin was about to enter the store, Lopez, who was leaving with his purchase, greeted Irwin and asked how he felt being a "scab?" Irwin answered, "pretty good" and that he was working. Irwin went into the store where Sarabia and another unidentified person were waiting at the counter. Lopez followed Irwin into the store and informed everyone that Irwin was a "scab." The unidentified man, a big man wearing a motorcycle jacket and leather boots who Lopez testified was a "biker looking guy," asked whether Irwin was in fact a "scab." When Lopez answered in the affirmative, the man spit on Irwin. In an attempt to avoid trouble, Irwin left the counter and tried to leave the store. Lopez, Sarabia, and the unidentified man stood in a semicircle around the door blocking his exit. Irwin returned to the counter as Lopez, Sarabia, and the unidentified man, who remained in a semicircle in front of the door, yelled at him and called him a "scab." Irwin asked the clerk to phone the police. The clerk refused. Lopez, Sarabia, and the unidentified man told Irwin that he was free to leave, that he should go outside so that the four of them could talk "like gentlemen." Irwin rejected this offer and stayed at the counter until Lopez, Sarabia, and the unidentified man left the store together. When they left Irwin looked out of the store's side window and observed that they were walking toward his car which was parked alongside of the store. Irwin then stepped outside the store to a point where he could observe the car. Sarabia was inside the car and the unidentified man, who had a knife in his hand, was cutting the car tires. Irwin did not see Lopez, but he only remained outside momentarily because as soon as he observed the knife he became afraid and went back into the store. When Irwin, by looking out of the store's side window, determined that Sarabia and the unidentified man were no longer at his car, he left the liquor store just in time to observe Lopez, Sarabia, and the unidentified man drive by in Sarabia's car. Irwin discovered that all of the tires on his car were flat as they had been slashed, that the door of the car had been kicked in, and that beer had been spilled in the back of the car and that an empty beer can was on the floor of the car.[3]

On February 9, 1979, immediately after the above-described incident, Irwin went to Respondent Employer's plant and reported what had occurred to Assistant Resident Manager Gary Gift who, after inspecting the damage to Irwin's car and having Irwin look at photographs of the Company's employees to be sure Irwin had not made a mistake in identifying Lopez and Sarabia as being involved, decided to discharge Lopez for his role in this incident.[4] Gift did not give Lopez a chance to describe his version of what had occurred because, he testified, Lopez was not available for questioning.

When the strike ended on March 26, 1979, Respondent Employer's volume of business at the Los Angeles plant was not at its prestrike level and as a result there were no vacant positions for any of the strikers. They were placed on a preferential hiring list. On or about March 26 Lopez phoned the plant and informed Personnel Su-

[2] Respondents admit and I find that Respondent Union and AWPPW are labor organizations within the meaning of Sec. 2(5) of the Act and that Respondent Employer is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the National Labor Relations Board's applicable discretionary jurisdictional standards.

[3] The above description of what took place on February 9 at the liquor store is based on the testimony of Irwin who impressed me in terms of his demeanor as a sincere and reliable witness. Lopez, the only other witness to testify about this occurrence, denied having any responsibility for, or knowledge of, the events which took place after the man spit on Irwin. He denied blocking the store's entrance, denied that the man came or left the store with himself and Sarabia, denied having anything to do with the damage to Irwin's car, or that he knew how the car was damaged. I have not credited Lopez' testimony, insofar as it was inconsistent with Irwin's, because Irwin, in terms of his demeanor, impressed me as being the more credible witness.

[4] Gift also decided to discharge Sarabia because he believed Sarabia had participated in the February 9 incident which resulted in the damage to Irwin's car and because Sarabia had engaged in other strike related misconduct. The record reveals Respondent Employer discharged other strikers, besides Lopez and Sarabia, who it believed had engaged in strike related misconduct.

pervisor Brandtner he was available for work. Brandtner at first told him she would place his name on the preferential hiring list, but then advised him the Employer intended to discipline him for picket line misconduct.

During the latter part of June 1979 a position became vacant which Respondent Employer would ordinarily have offered to Lopez, but instead Gift by letter dated June 25, 1979, wrote Lopez that he had been terminated because of the Employer's opinion that he had engaged in "serious strike misconduct." Enclosed with the letter was a "termination of employment" notice dated June 25, 1979, signed by Brandtner. Gift testified the reason Respondent Employer delayed notifying Lopez about his discharge until June 1979 was that since Lopez had not been working for Respondent Employer that Gift felt it was not necessary to discharge him until a job became available for him which the Employer, but for his strike misconduct, would have offered him.

2. Discussion and ultimate conclusions

Where, as here, Respondent Employer admittedly discharged Lopez for engaging in misconduct during the course of an economic strike and the misconduct was related to the strike activity, the General Counsel has established a *prima facie* violation of Section 8(a)(1) of the Act (*NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *General Telephone Co. of Michigan*, 251 NLRB 737 (1980)), and the burden shifts to Respondent Employer to prove that it discharged Lopez because of an honest belief that he engaged in strike misconduct sufficiently serious to justify his discharge. If the Respondent Employer fails to establish such an honest belief, the *prima facie* 8(a)(1) violation established by the General Counsel stands unrebutted. E.g., *Auto Workers v. NLRB*, 455 F.2d 1357, 1367 (D.C. Cir. 1971). On the other hand, if Respondent Employer establishes such an honest belief, the burden shifts to the General Counsel of proving that Lopez in fact did not engage in the alleged misconduct or that the alleged misconduct was not sufficiently serious to place Lopez beyond the protection of the Act. *Rubin Bro. Footwear*, 99 NLRB 610 (1952), cited with approval in *NLRB v. Burnup & Sims*, 379 U.S. at 23, fn. 3. Accord: *North Cambria Fuel Co v. NLRB*, 645 F.2d 177 (3d Cir. 1981).

I am persuaded, based on the evidence set forth *supra* , that Respondent Employer has established that Lopez was discharged because of Respondent Employer's good-faith belief that he was responsible for the damage done to Irwin's car. In so concluding I considered Respondent Employer's failure to question Lopez about his version of the facts and its delay in actually terminating his employment. However, Assistant Resident Manager Gift, who made the decision to terminate Lopez and who testified about the basis for that decision, impressed me in terms of his demeanor as a sincere witness whose explanation for not questioning Lopez and the delay in Lopez' termination was not unreasonable or inherently implausible.

I am also persuaded that the General Counsel failed to prove that Lopez did not engage in the alleged misconduct and am of the opinion that Lopez' misconduct was sufficiently serious so as to place him beyond the Act's protection. I realize there is no direct evidence that Lopez participated with Sarabia and the other man in damaging Irwin's car and that Lopez specifically denied engaging in this conduct. Nevertheless, I do not consider Lopez as a mere spectator without responsibility for the damage to Irwin's car. The damage was not an isolated act but was inextricably intertwined with a chain of events in which Lopez played a significant role.

Lopez' conduct triggered the chain of events which ultimately resulted in Irwin's car being vandalized. Lopez thereafter continued to play a part in these events right up until the vandalism and then left the scene with the persons who were observed vandalizing the car. Thus, Lopez told the customers in the store that Irwin was a "scab," which prompted the unidentified man to spit on Irwin. Then when Irwin tried to leave the store, Lopez joined with the unidentified man and Sarabia in blocking the store's entrance and Lopez continued to call him a "scab" and invited him to step outside the store and talk to the three of them "like gentlemen." It was at this point, when Irwin refused this invitation, that Lopez left the store with Sarabia and the unidentified man and Sarabia and the man proceeded to vandalize Irwin's car. Immediately thereafter Sarabia and the man left the scene together with Lopez. These circumstances, despite the lack of direct evidence that Lopez assisted Sarabia and the unidentified man in vandalizing Irwin's car, overwhelmingly establish that Lopez must also bear responsibility for the damage to Irwin's car. See *Giddings & Lewis, Inc.*, 240 NLRB 441, 455–456 (1979); *Firestone Tire & Rubber*, 187 NLRB 54, 55 (1970); *Co-Con, Inc.*, 238 NLRB 283, 289 (1978); *Alcan Cable West*, 214 NLRB 236 (1974). I further find that Lopez' conduct when viewed in its entirety constituted misconduct which was sufficiently serious to warrant his discharge. I therefore find that Respondent Employer did not violate Section 8(a)(1) of the Act by discharging him.

I also reject the General Counsel's alternative argument that Respondent Employer, in discharging Lopez, was motivated by his activities on behalf of AWPPW. There is a lack of the usual indicia which would warrant a finding that the General Counsel has made out a *prima facie* case that Lopez' discharge was discriminatorily motivated. The timing of the discharge was not significant. Respondent Employer did not exhibit the type of animus toward the AWPPW which indicates it would discharge employees because they supported that labor organization. There is no showing of disparate treatment. Quite the opposite, the record reveals that Respondent Employer discharged several striking employees besides Lopez, who it believed had engaged in strike related misconduct. And, for the reasons set forth, *supra* Respondent Employer's failure to question Lopez about his version of the facts and its delay in notifying him about his discharge do not warrant an inference of improper motivation. In any event, assuming *arguendo* that the General Counsel has made out a *prima facie* showing that Lopez' discharge was illegally motivated, the record establishes that Respondent Employer would have discharged him because of its belief that he had engaged in strike related misconduct even if he had not been an active supporter

of the AWPPW. Thus, it is undisputed that during the course of the strike and thereafter Respondent Employer discharged several strikers, besides Lopez, who it believed had engaged in strike related misconduct.

Based on the foregoing I shall recommend that the complaint in Case 21-CA-18080 be dismissed in its entirety.

B. *The Failure To Pay a Bonus and Severance Pay to Strikers*

1. The evidence

Respondent Employer has several operating divisions which manufacture different products. The plant involved herein was located in Los Angeles, California, and was one of several plants in Respondent Employer's flexible packaging division. The other plants in this division are located in North Portland, Oregon; San Leandro, California; St. Louis, Missouri; Orange, Texas; Greensburg, Indiana; and New Castle, Delaware.

Until 1958 the production and maintenance employees at the three west coast plants were represented by three locals of Respondent Union in separate bargaining units, except for a group of warehouse employees at the San Leandro plant represented by the Teamsters Union and the stereotyper employees at all three plants, who were represented by the Stereotyper Union before it merged into Respondent Union. The production and maintenance employees represented by Respondent Union at the three west coast plants were covered by three separate though identical contracts. Then, from 1958 to 1969 these employees were covered by a single contract between Respondent Employer and Respondent Union and from 1969 to 1977 there were two contracts covering them, one at San Leandro, excluding the warehouse employees represented by the Teamsters Union, and the other covering the North Portland and Los Angeles plants. These contracts were substantially the same except for certain picket line language and wage rates.

Respondent Employer and Respondent Union's Locals 387 and 388 entered into a collective-bargaining agreement covering the employees at North Portland and Los Angeles for the period October 1, 1972, through September 30, 1975. When Federal wage controls were lifted, on or about December 27, 1974, the parties agreed to increase the wage rates specified in the 1972-1975 contract during the final year (October 1, 1974, through September 30, 1975) and to extend the contract term for an additional 2 years ending September 30, 1977. They also agreed that employees "presently covered" by the agreement would be paid a lump sum bonus based on the length of time each employee was employed during the period immediately preceding October 1, 1974. The extension agreement was incorporated into the 1972-1975 agreement to form a composite document which the parties executed on September 9, 1975. A similar extension agreement was entered into for the San Leandro plant.

Some time prior to the extension agreement, AWPPW filed a timely representation petition with the National Labor Relations Board seeking certification as the collective-bargaining representative of the employees at the North Portland plant. It also sought certification at the San Leandro plant in a separate proceeding. After hearings were conducted, the Regional Director for Region 19 of the National Labor Relations Board, directed an election in a unit of employees at the North Portland and Los Angeles plants, and his Direction of Election was affirmed by the Board. On March 9, 1978, AWPPW was certified as the bargaining representative of the employees at the North Portland and Los Angeles plants. AWPPW was also certified as bargaining representative of a separate unit of employees at San Leandro.

Representatives of Respondent Employer and AWPPW met in May 1978 and reached an understanding that the terms and conditions of employment of the employees at the North Portland and Los Angeles plants would remain essentially the same as they were under the Respondent Employer-Respondent Union contract which terminated September 30, 1977, pending the negotiation of an initial collective-bargaining agreement between AWPPW and Respondent Employer. Between that date and early September 1978, more than 20 negotiation meetings were held. The discussions focused primarily on language issues. On September 6 and 7, 1978, wages, monetary fringe benefits and other economic issues were discussed for the first time. The parties at the end of these meetings failed to reach agreement on at least 25 separate issues including wages. AWPPW was proposing a 70-cent-per-hour wage increase retroactive to October 1, 1977, the date of the expiration of Respondent Union's contract, which would be rolled up, that is, included in the base figure for any future increase. AWPPW sought this retroactive payment for workers who had quit their employment as well as for active employees. Respondent Employer, in conjunction with a 3-year contract, effective October 1, 1978, proposed a 20-percent general pay raise effective October 1, 1978, and an additional increase of 15 percent 18 months later. Respondent Employer also proposed that "each employee who is in the employment of the Company on the date of the execution of the Agreement or who retired after October 1, 1977, shall immediately be paid $100 per month for each month between October 1, 1977 and October 1, 1978, during which he received earnings from the Company." Respondent Employer believed that the 20-percent wage increase was sufficiently generous so as to compensate the employees for the period following the expiration of Respondent Union's contract during which there had been no pay raise, so as to eliminate the need for retroactivity. In addition, Respondent Employer offered the $100 bonus as an inducement to the employees to accept its proposed contract because Respondent Employer's negotiators had been informed that Respondent Union's negotiators intended to recommend that the employees reject it and strike the Employer.

The employees rejected Respondent Employer's proposal and on September 9, 1978, a strike began at the North Portland and Los Angeles plants. At North Portland, all of the approximately 600 employees represented by AWPPW remained out on strike until March 26, 1979, when it ended. At Los Angeles approximately 220 bargaining unit employees were employed when the strike commenced. At first, all of them honored

AWPPW's strike and refused to cross the picket lines. After approximately 10 or 12 days, however, employees at the Los Angeles plant began to cross the picket lines and return to work and by March 26, 1979, when the strike ended, 133 of the employees who had initially supported the strike were back at work.[5] Of the remaining 87 employees who stayed out on strike for its duration, 24 were recalled to work at various times after the picketing ceased on March 26, 1979, and the remainder did not return to work at any time before the plant closed late in 1980.

The end of the picketing on March 26, 1979, at the Los Angeles and North Portland plants occurred shortly after Respondent Union filed a representation petition on March 12, 1979, with the National Labor Relations Board seeking certification as bargaining representative for the employees in the Los Angeles plant only. Representatives of Respondent Employer and AWPPW met in March 1979 following the filing of the representation petition. Respondent Employer's principal representative, Ellison, took the position that the Employer could not lawfully negotiate either a collective-bargaining agreement or a strike settlement agreement while the question concerning representation raised by Respondent Union's representation petition was pending. The parties at this meeting, however, talked about the employees' return to work. In fact, when AWPPW's principal representative, Rodgers, arranged for this meeting, he informed Ellison he wanted to meet in order to talk about putting the strikers back to work. During the meeting Rodgers indicated that AWPPW wanted to end its strike and send the workers back to work. With respect to the Los Angeles plant, the plant manager, who was present, explained to Rodgers that business was off, that the 133 employees already working were about all that were needed, and that the Employer might eventually be able to take some of the strikers back if and when the plant got back some of the business it had lost during the strike, but the outlook was not promising for very many of the strikers. Rodgers proposed that Respondent Employer layoff all the Los Angeles workers and then reopen the plant and reemploy the nonstrikers and strikers strictly on the basis of seniority. Ellison rejected this proposal and informed Rodgers that the strikers would be offered reinstatement on the basis of their seniority and that once reinstated a striker would regain his or her departmental seniority over less senior employees. The meetings ended with Rodgers stating AWPPW intended to end the strike for the duration of the period in which the question concerning representation precluded bargaining.

In 1979, following the end of the strike on March 26, 1979, Respondent Employer on various dates reemployed 24 strikers. The last one was reemployed in August 1979. In October 1979, the strikers who had not been reinstated and who had not voluntarily terminated their employment or been discharged due to strike-related misconduct were placed by Respondent Employer on a preferential hiring list. Respondent Employer's personnel supervisor for the Los Angeles plant, Brandtner, the person responsible for maintaining the preferential hiring list, testified that the strikers who were named on this list were eligible for recall and that it was Respondent Employer's intent to reinstate them to vacant positions before hiring anyone else and this remained Respondent Employer's intent right up until the closing of the plant. The record reveals that the last time prior to the closing of the Los Angeles plant in December 1980 or January 1981 that there were vacancies for unit employees at that plant was in August 1979 and that these vacancies were filled by strikers on the preferential hiring list.

The representation petition filed by Respondent Union in March 1979 resulted in a Decision on Review and Direction of Election issued by the Board on October 22, 1979, wherein an election was directed in a single plant unit comprised solely of the employees at the Los Angeles plant. The election was conducted November 27, 1979, and, on December 5, 1979, Respondent Union was certified as the representative of the production and maintenance employees at this plant.

Shortly before Respondent Union's certification of the Los Angeles unit, AWPPW and Respondent Employer reached agreement for a new collective-bargaining agreement covering the employees at the North Portland plant effective October 1, 1979, to September 30, 1982.[6] The wage package in this agreement included the following provisions: from October 1, 1977, to September 30, 1978, the employees actively employed as of the date of the contract's ratification and those who retired during that period would receive a 60-cent-per hour wage payment for all hours worked, which payment would be a lump-sum amount, not rolled up in future wages; the employees would receive the 20-percent wage increase Respondent Employer instituted during the strike in September 1978; and, they would receive a 10-percent wage increase effective October 1, 1979, a 67-cent-per-hour increase effective October 1, 1980, and an 8-1/2-percent increase effective October 1, 1981. This information was promptly reported by Respondent Union to the employees at the Los Angeles plant in an organizational campaign memo issued November 14, 1979.

Negotiations between representatives of Respondent Employer and Respondent Union were held on December 17 and 18, 1979. The negotiations resulted in a collective-bargaining agreement covering the Los Angeles plant that was entered into on December 26, 1979, and by its terms was effective from October 1, 1979, until October 1, 1982. The contractual wage package called for Respondent Employer to maintain the 20-percent wage increase it had instituted in September 1978; a 10-percent general wage increase effective October 1, 1979; a 7.85-percent general wage increase effective October 1, 1980; and 8.5-percent increase effective October 1, 1981. In addition, the parties agreed to the bonus payment which is alleged herein to be a violation of the Act. The bonus arrangement, which is not included in the executed contract, was that employees covered by the contract and actively employed at the time of its ratification

[5] On September 27, 1978, Respondent Employer placed into effect its 20-percent wage increase proposal which was paid to the returning strikers.

[6] Ellison, who was out of the country at the time, did not serve as the Respondent Employer's principal representative.

would be paid 60 cents for each straight-time hour worked, 90 cents for each time-and-one-half hour worked, and $1.20 for each double-time hour worked during the last full contract year preceding the execution of the contract, which was the period of October 1, 1978, to September 30, 1979. Employees who retired during this period were also to be paid the bonus.

The circumstances leading up to the negotiation of the aforesaid bonus agreement were as follows. Early in December 1979, prior to the start of the contract negotiations and in anticipation of those negotiations, Respondent Union's negotiating committee, composed of employees, polled the other employees to determine what contract proposals the committee would submit, on the employees' behalf, to Respondent Employer's negotiators. One of the proposals submitted to the Union's committee by an employee was for a 75 cent-per-hour bonus for the period October 1, 1978, through September 30, 1979, which in addition to straight-time hours would cover premium hours as well as vacation and holidays, and further provided that regardless of the number of hours worked during the governing time period, everyone employed during the period would receive a minimum of $100 a month, and the bonus would be paid to retirees who worked during the period. Gary Green, one of the members of Respondent Union's negotiating committee, testified that the committee decided to include the bonus proposal in its contract proposal which was submitted to Respondent Employer's negotiating committee because the employees had been informed by representatives of management that the period of time for which the Union was seeking the bonus, when compared to earlier months, had been a more profitable period for the Los Angeles plant;[7] a majority of the employees currently employed had worked a substantial number of hours during the time period covered by the bonus proposal so the committee felt that a bonus arrangement based on hours worked was a good one; and retirees were included because their inclusion in such a benefit plan was "one of the precepts of unionism." There was no discussion by Respondent Union's committee about the subject of whether employees who were not on the active payroll, other than retirees, would be eligible to receive bonus payments. However, from their past experience in negotiating with Respondent Employer, the committeemen knew that Respondent Employer would be adamantly opposed to a bonus proposal which included employees who were not actively employed.

On December 17, 1979, at the start of the negotiations, Respondent Union's negotiating committee took the position that Respondent Union was not interested in the language changes proposed by AWPPW in its unsuccessful negotiations. Instead, Respondent Union's negotiators proposed that the contractual language included in Respondent Union's 1975–77 contract with Respondent Employer be used as a basis for the negotiations. Respondent Employer's negotiators agreed to this proposal.

Regarding the bonus proposal Respondent Union's negotiating committee informed Respondent Employer's negotiators that it was their understanding that during the past several months the Los Angeles plant had been operating more profitably than previously, so they thought it only right that the employees share in these profits. Respondent Employer's negotiators indicated that the Company was prepared to grant something to the employees in the way of a bonus provided that the payments were limited to the employees on the payroll at the time of the ratification of the agreement,[8] but objected to a minimum monthly payment and the sum of 75 cents per hour. The parties thereafter reached agreement on the terms of a bonus provision at which point Respondent Union's negotiating committee stated it would like the bonus in the hands of the employees before Christmas, if possible. Respondent Employer's negotiators stated that the Employer would immediately start processing the bonus checks so that if the parties were able to enter into a contract prior to Christmas that the Employer at the time the contract was signed would give the bonus checks to the representative of Respondent Union for distribution to the employees and that there would be no need to even include the bonus agreement in the body of the contract.

The Los Angeles plant operated under the Respondent Union-Respondent Employer 1979–82 contract until the plant was closed in December 1980 or January 1981. The decision to close the plant was made in August 1980 and the layoffs necessary to effectuate the closing were made in stages thereafter. Pursuant to article XXI of the governing collective-bargaining agreement, Respondent Employer paid severance pay to the employees who were laid off because of the plant closing. Respondent Employer did not pay severance pay to other employees or former employees including the 47 strikers who had not been reinstated after the strike, but whose names appear on the Employer's preferential hiring list. Respondent Employer's failure to pay severance pay to the 47 strikers whose names appear on the preferential hiring list is an issue in this proceeding.

2. Discussion and analysis

a. *The bonus*

The complaint alleges that Respondent Union violated Section 8(a)(1)(A) and (2) of the Act and that Respondent Employer violated Section 8(b)(2) and (1)(A) of the Act by negotiating and implementing their 1979 bonus agreement covering the employees at the Los Angeles plant, insofar as the bonus agreement was based on the hours the employees worked from October 1, 1978, through September 30, 1979, rather than from October 1, 1977, through September 30, 1978. The allegations against Respondent Union are based on alternative theories: (1) The October 1, 1978—September 30, 1979, time period for computing the employees' bonuses was proposed and negotiated in derogation of Respondent

[7] Respondent Employer's profit and loss statements indicate this was true.

[8] Respondent Employer expressed no objection to the dates suggested by Respondent Union for computing the bonus. Ellison, the Employer's principal negotiator, testified that he considered the dates to be "perfectly logical" because every bonus based on hours worked that he had agreed to during his long career as a labor negotiator had been based on the period immediately preceding the date of the negotiated contract.

Union's statutory duty to fairly represent the employees who supported AWPPW's strike; and (2) the October 1, 1978—September 30, 1979, time period for computing the employees' bonus was proposed and negotiated by Respondent Union to punish these employees for having supported the strike. The allegations against Respondent Employer are based on the theory that Respondent Employer participated in Respondent Union's arbitrary and discriminatory action.

(1) Respondent Union's alleged improper conduct

In support of the contention that Respondent Union acted upon arbitrary and discriminatory grounds in proposing and negotiating a bonus agreement based on the hours employees worked during the strike conducted by its rival, AWPPW, rather than an earlier period of time predating the strike, the General Counsel urges that I take into consideration the fact that Respondent Union was hostile toward AWPPW; that the necessary effect of basing the employees' bonus payments upon the hours they worked during AWPPW's strike was to penalize those employees who supported the strike; that the use of the 1978–79 period to compute the bonuses rather than the 1977–78 period was unreasonable and arbitrary; and the collective-bargaining agreement negotiated by Respondent, including the bonus agreement, was not the product of give-and-take negotiations. I shall examine each of these contentions.

Respondent Union was hostile toward AWPPW because they were rival unions competing for the allegiance of the employees employed at Respondent Employer's North Portland and Los Angeles plants. There is also evidence that at least one employee who became a member of Respondent Union's negotiating committee tried to persuade the Los Angeles employees not to support AWPPW's strike, that thereafter employees who became members of Respondent Union's negotiating committee attempted to persuade the Los Angeles strikers to return to work and that when some of the strikers did return to work advised them they were trying to replace AWPPW with Respondent Union and solicited them to sign a petition to assist them in their effort. The foregoing however does not warrant the inference that either Respondent Union's officials or the employee members of its negotiating committee, who negotiated the disputed bonus, were hostile toward the employees who failed to return to work during the strike. There is insufficient evidence to establish that the officials of Respondent Union, including the employees who negotiated the disputed bonus provision, were hostile toward the employees employed at the Los Angeles plant who supported AWPPW's strike.

Even if Respondent Union, as suggested by the General Counsel, had proposed and negotiated a bonus arrangement which computed the employees' bonuses based on the hours worked during the period from October 1, 1977, through September 30, 1978, which the General Counsel concedes would have been a lawful proposal, its natural effect on the strikers would not have been significantly different from the bonus arrangement proposed and negotiated by Respondent Union which the General Counsel claims is illegal. For, under either bonus arrangement, in order to be eligible for a bonus an employee must have been on Respondent Employer's active payroll as of the date the parties executed the governing collective-bargaining agreement. It was this requirement, rather than the bonus computation period, which resulted in no bonus being paid to the vast majority of the strikers who remained on strike for its duration.[9] Such a requirement, the record reveals, has been included in bonus agreements or proposals to which Respondent Employer has been a party. It was included in the 1975 bonus agreement between Respondents. It was included in the bonus proposal presented to AWPPW by Respondent Employer prior to the strike. Such a requirement was a part of the bonus agreement reached by Respondent Employer and AWPPW in 1979 covering the North Portland and San Leandro plants. Respondent Union in framing its bonus proposal and negotiating that proposal agreed to this requirement because it realized that in the past Respondent Employer had insisted that bonus proposals be limited to active employees on the payroll at the time the contract was ratified.

In view of the aforesaid circumstances, I am of the view that the General Counsel's position, that Respondent Union's choice of time period to compute the employees' bonuses had the foreseeable result of discriminating against the strikers herein, grossly oversimplifies what actually took place. Rather, the record reveals that the strikers involved would have been treated virtually the same regardless of the time period proposed by the Union and negotiated by the parties for the computation of the bonus payments because of the further requirement that in order to be eligible for a bonus an employee had to be on the Company's active payroll as of the date of the contract's ratification. There is no contention that this requirement was illegal *per se* [10] or that in including it in its bonus proposal Respondent Union was illegally motivated. Quite the opposite, the record establishes that such a requirement was always included in bonus type arrangements negotiated by Respondent Employer with both Respondent Union and AWPPW.

In support of its contention that the record reveals that the use of the October 1, 1978, through September 30, 1979, time period, rather than the period from October 1, 1977, through September 30, 1978, to compute the bonus payments was unreasonable and arbitrary, the General Counsel points to the following factors: Respondent Employer previously expressed a willingness to make a bonus payment covering the 1977–78 period; the strike was precipitated by AWPPW's insistence on a payment of a bonus for the 1977–78 period; the contracts covering the Los Angeles and North Portland plants negotiated by Respondent Employer following the strike were similar on all matters except the period covered by the bonus payments; and the employees who worked

[9] Of the 47 strikers whose names appear on the preferential hiring list, not one would have gotten a penny under the terms of the bonus agreement which the General Counsel says the parties should have entered into. Its sole effect would have been to increase the amount of the bonus payments awarded to the 24 strikers who supported the strike for its duration and were reinstated prior to December 27, 1979, the date Respondents entered into their contract covering the Los Angeles plant.

[10] See *Ace Beverage Co.*, 253 NLRB 951 (1980).

during the October 1, 1978—September 30, 1979, period had already benefited from Respondent Employer's 20-percent wage increase, whereas those who worked during the October 1, 1977—September 30, 1978, period had received no additional benefits. I shall examine these contentions.

It is true that in September 1978 shortly before the commencement of the strike, Respondent Employer offered AWPPW a bonus proposal based on the number of hours worked by employees from October 1, 1977, through September 30, 1978. The proposal, however, was keyed to the year immediately prior to the effective date of the new agreement, which is consistent with Respondent Union's December 1979 bonus proposal, and was automatically removed from the bargaining table when the strike commenced. Although, upon the resumption of negotiations in the fall of 1979, Respondent Employer agreed to a bonus arrangement with the AWPPW covering the North Portland and San Leandro plants to be computed on the basis of the hours worked by employees from October 1, 1977, through September 30, 1978, the record shows that due to the strike there were absolutely no employees employed at those plants during the October 1, 1978—September 30, 1979, period for over 6 months. Thus, a decision to use the earlier 1977–78 period was necessary if the bonus was to apply to hours worked in substantially all of a contract year. In other words, the period of time agreed to by AWPPW and Respondent Employer represented a time when employees worked a representative number of hours. Similarly, the period of time agreed upon by Respondent Employer and Respondent Union for the bonus at the Los Angeles plant represented a time when employees worked a representative number of hours. And, while it is true that the payment of a bonus or some other payment for the 1977–78 period was an issue that was outstanding at the time the strike commenced, it was not the only issue, but only one of several, all of which were of equal importance to AWPPW. As a matter of fact, it does not appear that the period to be covered by a bonus or other payment was an issue. AWPPW wanted the payment to take the form of a retroactive wage increase, rolled up into the wage package and payable to employees who had worked during that period, even though they were no longer currently employed having terminated their employment. Respondent Employer was only willing to offer a bonus to current employees to induce ratification of the contract. AWPPW eventually changed its position as to these matters, when it negotiated a bonus for North Portland and San Leandro employees after the strike ended.

The collective-bargaining agreement that Respondents negotiated to cover the employees at Los Angeles is not patterned after the North Portland contract. When Respondents commenced their negotiations in December 1979, they agreed to revert to the contract language contained in Respondent's 1975–77 contract as the basis for renewed negotiations and in fact the language in the contract was patterned after the parties' last contract. Respondent Union and its negotiating committee were generally aware of the economic provisions contained in the North Portland agreement. Their proposals differed from that agreement in several respects, but the final settlement which Respondent Union agreed to in Los Angeles was scaled down from the proposals. It closely tracked the North Portland agreement on economic matters which is not surprising, but differed on several economic provisions. As I have discussed *supra*, Respondent Union's bonus proposal and eventual agreement on that subject differed from the North Portland agreement with respect to the time period chosen for computing the bonus. The bonus agreement in Los Angeles differed in another respect. The Los Angeles bonus agreement provided for a basic bonus payment of 60 cents per hour, increased by appropriate amounts to take into account hours worked that involved premium pay. The North Portland bonus agreement provided for a flat 60 cents per hour, with no adjustment for premium wages.

The General Counsel contends that since the employees who worked during the period from October 1, 1978, through September 30, 1979, received a 20-percent pay raise, but did not receive a pay raise during the period from October 1, 1977, through September 30, 1978, it warrants the inference that Respondent Union's proposal that the bonus be computed based on the hours worked by the employees during the 1978–79 period was motivated by improper considerations or at the very least shows the Union was acting unreasonably and arbitrarily. I do not believe that circumstances warrant such an inference. The 20-percent wage increase was unusually large, in view of the fact that the employees had not received a pay raise in some time, but it was not large enough to satisfy the employees inasmuch as they voted down Respondent Employer's contract offer which included the 20-percent pay raise. Under the circumstances, I cannot infer that the employees and their bargaining representative were satisfied with the 20-percent pay raise which was granted to them in 1978, rather, it is just as reasonable to infer that they felt they were entitled to more money for their work during the 1978–79 period.

Finally, the fact that agreement was reached between Respondents only after 2 days of negotiations does not warrant the inference that the agreement was not the result of give-and-take negotiations. As I have found *supra*, Respondent Union informed Respondent Employer at the outset of their December 1979 negotiations that the Union wanted to base negotiations on the contract language which had been in effect prior to the certification of AWPPW, language which Respondent Union and Respondent Employer had worked out over a period of years. At that point, the negotiations took on the character of renewal negotiations, as to which reaching an agreement in only 1 or 2 days is not unusual. There is no need to devote more than 20 bargaining sessions stretching over a 3-month period to a section-by-section discussion and revision of contract language, as was the case during Respondent Employer's bargaining with AWPPW. Also, AWPPW's agreement with the Employer covering the employees at North Portland was available to serve as a guide as to how far the Employer was willing to go on major economic items, and was calculated to shorten the length of negotiations. Lastly, both the

Employer and Respondent Union came into the negotiations eager for a contract: the Union because of the long period of time the unit employees had been without a contract; the Employer because it had just gone through a lengthy strike which severely disrupted its business operations and did not relish the prospect of another strike.

Given the particular circumstances herein—the lack of evidence that Respondent Union was antagonistic toward the employees who supported AWPPW's strike, the evidence that Respondent Union's choice of the October 1, 1978—September 30, 1979, bonus computation period was based on precedent,[11] the evidence that this computation period was proposed because a significant majority of the unit employees worked a substantial number of hours during that period and would benefit from this proposal and that Respondent Employer's increased profitability justified a bonus for the period selected—I conclude that the evidence is insufficient to establish that Respondent Union, in proposing and negotiating the October 1, 1978—September 30, 1979, bonus computation period was motivated by a desire to punish the employees who supported AWPPW's strike or was otherwise motivated by irrelevant, invidious or unfair considerations in derogation of its statutory duty of fair representation. In so concluding, I considered the several factors pointed to by the General Counsel, *supra*, and am persuaded that whether viewed separately or in their totality they do not establish either illegal motivation or a failure by Respondent Union to fulfill its statutory duty of fair representation in negotiating the disputed bonus computation period. In my opinion, when viewed in the light most favorable to the General Counsel, this is a situation where Respondent Union in including the October 1, 1978—September 30, 1979 computation period in its bonus proposal failed to consciously consider the effect of this computation period, as contrasted to an earlier period, on the strikers' bonus payments. In this regard the record shows that Respondent Union's negotiating committee when it drafted the Union's contract proposals, in preparation for the December 1979 negotiations, did not even think about the unreinstated strikers who were on Respondent Employer's preferential hiring list or consider the effect that different bonus computation periods would have upon them. Respondent Union's negligence in this respect, standing alone as it does in this case, however, is insufficient to warrant a finding that it breached its duty of fair representation nor is it a sufficient basis for inferring discriminatory motivation. E.g., *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974). I recognize that Respondent Union's reason for failing to consider the unreinstated strikers who were on the Employer's preferential hiring list when it proposed the bonus computation period was based on the union negotiating committee's assumption that since these individuals were not currently employed and had not been for some time that they were not unit employees. Nevertheless, where as here, the record shows that in selecting the disputed bonus computation period Respondent Union acted consistent with past bargaining precedent and out of a good-faith belief that this was a proposal which would benefit a significant majority of the unit employees, I am not persuaded that the Union's failure to consider the effect that the bonus computation period would have on the unreinstated strikers converted its conduct into a breach of its duty of fair representation. This is especially true here because the provision in the bonus agreement which requires that the bonus only be paid to current employees, the legality of which is not challenged, made whatever bonus computation period of no significance to the 47 unreinstated strikers inasmuch as these individuals were ineligible for a bonus regardless of the computation period.

Based on the foregoing I shall recommend that the allegations against Respondent Union in Case 21-CB-7182 be dismissed in their entirety.

2. Respondent Employer's alleged improper conduct

The General Counsel contends that Respondent Employer acted illegally when it accepted Respondent Union's bonus proposal insofar as that proposal was based on the hours worked by the Los Angeles employees from October 1, 1978, through September 30, 1979, instead of from October 1, 1977, through September 30, 1978. The basis for this allegation is that Respondent Union violated the Act in making this proposal and that Respondent Employer in accepting it participated in Respondent Union's discriminatory and arbitrary action, with no legitimate objective. I have found, *supra*, that Respondent Union did not violate the Act by making this proposal. Accordingly, for this reason, I shall recommend the dismissal of the allegations against Respondent Employer in Case 21-CA-18605 in their entirety.

If I have erred in dismissing the unfair labor practice allegations against Respondent Union, I am still of the opinion that the allegations against Respondent Employer should be dismissed for the reason that the record fails to establish that in accepting Respondent Union's bonus computation proposal Respondent Employer had reasonable grounds to believe that it was advanced by the Union for discriminatory or arbitrary reasons. I am also persuaded that the record establishes that Respondent Employer had a legitimate and substantial business justification for agreeing to the bonus computation period proposed by the Union. The basis for these conclusions follow.

Regarding the bonus computation period, Respondent Union's negotiators informed Myron Ellison, Respondent Employer's principal negotiator, they selected this period because, in comparison to the preceding 12-month contractual period, they understood it was a more profitable period and felt the unit employees should share in those profits. Ellison testified he felt that the time frame for computing the bonus proposed by Respondent Union was "perfectly logical" because every other bonus based

[11] As I have found *supra*, the record establishes that in negotiations a bonus to be paid to the employees on the basis of hours worked during the contract year immediately preceding the agreement (October 1978 through September 1979) Respondent Union was following established precedent. The departure from the norm came in North Portland, where a period other than the contract year immediately preceding the agreement was selected, presumably at AWPPW's insistence.

on hours worked that Ellison negotiated had been keyed to the period of time immediately preceding the agreement and Respondent Union's proposal conformed to that pattern. The record reveals no reason why Ellison should have looked behind Respondent Union's bonus computation period proposal, which he regarded as the appropriate period, at the risk of placing an obstacle in the way of the negotiation of a collective-bargaining agreement after more than 2 years of labor unrest. Nor is there evidence that Ellison had reason to believe that Respondent Union selected the 1978–79 period with an intention to discriminate against those employees who supported AWPPW's strike.

Likewise the record establishes that Respondent Employer had a legitimate and substantial business justification for accepting the bonus computation period proposed by Respondent Union.

The Los Angeles plant had been without a collective-bargaining agreement for more than 2 years, when Respondent Employer's and Respondent Union's representatives met in December 1979. The prior agreement between Respondent Employer and Respondent Union, covering the Los Angeles and North Portland plants jointly, expired in September 1977. The intervening 2 years and 3 months had encompassed two representation proceedings, 3 months of intense bargaining negotiations with AWPPW and, when the negotiations failed, a strike. Although the great majority of the employees at the Los Angeles plant returned to work during the strike, picketing continued for 6-1/2 months, September 8, 1978, to March 26, 1979. The plant lost business during the strike period and, as of December 1979, still had not recovered all of the lost business. Under these circumstances, Respondent Employer was understandably anxious for a period of labor peace and its principal negotiator, Ellison, was instructed by his supervisor that the Employer wanted the negotiations settled without a strike. Al Resnick, the corporate official to whom Ellison reported, informed him that he "wanted it [the negotiations] settled," and that he "wanted an agreement."

Upon receipt of Respondent Union's bonus proposal, Ellison took the position that Respondent Employer was willing to respond positively to the Union's bonus request in an amended form, provided the payments were limited to individuals on the payroll as of the date of the contract's ratification. The purpose of a bonus, in Ellison's mind, was to induce the employees to ratify the contract. And it is undisputed that the persons who voted to ratify the contract were the employees currently employed. This was the same consideration which led Ellison to propose a bonus, limited to active employees, in an effort to reach an agreement with AWPPW, when that union represented employees in the combined North Portland-Los Angeles unit.

Ellison's instructions to settle the negotiations, Respondent Union's willingness to scale down its financial requests regarding the bonus by decreasing the hourly rate from 75 to 60 cents and dropping the $100 per month minimum, Respondent Union's agreement with Ellison's proposal to limit the bonus to active employees, and the concurrence of the parties to the appropriate period for computing the bonus, all combined to result in an agreement on the bonus issue. That, in turn, led to an agreement on all outstanding issues, and, after ratification, to a 3-year labor contract. The execution of a contract promising 3 years of labor peace after more than 2 years of unrest was, in my opinion, a legitimate and substantial justification for Respondent Employer's acceptance of the period for computing the bonus proposed by Respondent Union.

The aforesaid circumstances which establish that Respondent Employer had no reason to question Respondent Union's motivation in proposing the 1978–79 period for computing the bonus and had a legitimate and substantial business justification for accepting this bonus computation period, are so overwhelming that even assuming Respondent Employer engaged in certain conduct which indicates animus toward the employees who supported AWPPW's strike, this evidence in whole or in part is insufficient, in my opinion, to impugn Respondent Employer's motivation for accepting Respondent Union's proposal.[12]

(b) *The Severance Pay*

In October 1979 Respondent Employer compiled a list of 47 individuals who had ceased working at the Los Angeles plant when the strike was called by AWPPW and had not returned to work since the strike, but who would be afforded preferential hiring rights when work became available.[13] The list did not include strikers who

[12] I agree with Respondent Employer that Personnel Supervisor Brandtner's August 27, 1979, notification to the unreinstated strikers that to retain their seniority they must notify the Employer of this each month, does not establish antipathy by Respondent Employer toward the strikers where, as here, the record shows that Brandtner issued this instruction in an effort to help the strikers maintain their reinstatement rights and as soon as she was informed that her conduct was improper immediately rescinded the order. Likewise, Respondent Employer's requirement that strikers who returned to work after the end of the strike submit to a physical examination because of the length of time they had been absent from work does not indicate that the Employer was antagonistic toward the strikers. Nor does the fact that Respondent may have failed to pay striking employees certain vending machine moneys indicate such animosity. I have also considered the testimony of striking employee Smith, who was reinstated after the end of the strike, that after her reinstatement she was warned by management if she was absent twice within 90 days she would be terminated. I am unable to conclude this warrants an inference Smith was being discriminated against because she had supported the strike. Finally, although Respondent Employer during the strike allowed a group of employees to use its conference room to talk to strikers who had been reinstated, there is insufficient evidence to establish that Respondent Employer realized that these employees were trying to persuade the returning strikers to sign a petition asking AWPPW to disclaim its status as the employees' collective-bargaining representative. Finally, as I have stated *supra*, assuming my evaluation of the aforesaid indicia of animus relied upon by the General Counsel is wrong in whole or in part, it would not change my determination that Respondent Employer's conduct in accepting the bonus computation period proposed by Respondent Union was motivated by legitimate and substantial business considerations and that there is insufficient evidence that Respondent Employer in accepting the proposal should have reasonably known that it was proposed for illegal or arbitrary reasons.

[13] Respondent Employer suggests that the strikers on the preferential hiring list are not entitled to the usual rights afforded by the Act to unreinstated economic strikers because there is no showing that they requested reinstatement. I disagree. I am persuaded that AWPPW's representative, the strikers' designated bargaining representative when the strike ended, during the meeting with Respondent Employer's representatives held in March 1979 shortly before the end of the strike, in effect

Continued

voluntarily terminated their employment by resignation, retirement, or by accepting work elsewhere, or those whose employment was terminated due to picket line misconduct. The last recalls made by Respondent Employer after the strike to fill vacant positions took place in August 1979 approximately 1 year prior to the decision to close the Los Angeles plant.

As described *supra*, Respondent Employer decided in August 1980 to close its Los Angeles plant. Layoffs to effectuate the closing were made in stages, with the first permanent layoffs occurring in October 1980. Employees who were laid off pursuant to the decision to close were paid severance pay pursuant to article XXI of the governing collective-bargaining agreement. That provision, which had been included in contracts between Respondent Employer and Respondent Union for 12 or 15 years, provides in pertinent part:

> ARTICLE XXI—Severance Pay
>
> *Section 1.* The Union recognizes that the Company has the right to transfer operations to other parts of the country, to subcontract operations when it becomes necessary, or to close its plant or any department thereof.
>
> *Section 2.* The Company agrees that when such cases arise and employees are laid off because of such circumstances, the severance pay will be made in accordance with the following schedule.

Employees who were laid off at various times starting in October 1980 were paid severance pay, with the precise amount paid to each employee being based on the contractual criteria of actual pay received during the employee's last week of work and length of service.

Various groups of employees who were employed at the plant when the strike commenced received no severance pay. They included employees who voluntarily terminated their employment or retired after the strike commenced and before the Employer decided to close the plant (some of whom did, and others of whom did not first return to work at the Employer's facility), employees who returned to work but who did not successfully complete a 90-day probationary period, employees who were refused reinstatement because of picket line misconduct, employees who returned to work but were subsequently discharged for cause, those who were on disability leave, and a group of 12 employees who were already on layoff when the decision to close the plant was made and who remained on layoff status until their employment was formally terminated October 8, 1980. The remaining group of employees who did not receive severance pay consists of 47 strikers who were never recalled to work after March 26, 1979, the date the strike ended, but whose names were on the preferential hiring list.

Respondent Employer's failure to pay severance pay to the last named group of workers is alleged to be a violation of Section 8(a)(1) of the Act. In support of this allegation the General Counsel relies upon the Board's decision in *Knuth Bros.*, 229 NLRB 1204 (1977), enfd. 584 F.2d 813 (7th Cir. 1978). There the Board held that an employer's failure to pay vacation benefits to striking employees, for the sole reason that the employees were not on the "active payroll" on a specified vacation "accrual date," violated Section 8(a)(1) of the Act because the employees were denied such benefits "as a consequence of their having engaged in . . . lawful activities." 229 NLRB at 1205. In *Knuth Bros.* and in other similar cases the Board has emphasized that the employment benefits which the strikers were denied had been earned or accrued by the strikers prior to their going on strike, and that the employers' conduct in refusing to pay such benefits because the strikers were not on the active payroll on an arbitrary cutoff date required "forfeiture of accrued economic benefits by the . . . strikers." *Thorwin Mfg. Co.*, 243 NLRB 620, 622 (1979). I am of the opinion that *Knuth Bros.* is inapposite to the instant situation.

Here the employees who left work to engage in a strike called by AWPPW were not, at the time the strike began, entitled to "earned" or "accrued" severance pay benefits.[14] Their cessation of work was in support of AWPPW's bargaining demands. It was not a layoff, and it had nothing to do with any of the events that might trigger Respondent Employer's obligation to pay severance pay—subcontracting or transfer of operations, or closing of the plant or a department thereof.

Nor did the strikers who were never recalled to work and were listed on the preferential hiring list acquire any accrued or earned severance pay benefit by virtue of their status as unreinstated economic strikers. They were not laid off in any generally accepted sense of that term. Moreover, it is clear that Respondent Employer's inability to recall all eligible employees to work since the end of the strike on March 26, 1979, was not attributable to the hiring of permanent replacements or the subcontracting of work or the permanent transfer of work or closing of the plant or any of its departments. Respondent Employer's inability to reinstate the 47 strikers was due to the fact that the Employer lost business during the strike, that business was not restored to prestrike levels, and that the Employer already had all the employees it needed to perform the available work. The state of affairs continued in effect in August 1980, when it was decided to close the plant. At that time, disregarding the decision to close the plant, the unreinstated strikers on the preferential hiring list did not have any reasonable expectation of returning to work in the foreseeable future.

The severance pay benefits in the instant case were not accrued by the unreinstated strikers in the same sense that the vacation pay in *Knuth Bro.* was accrued on the basis of time worked during the course of a single year. Under the terms of the governing collective-bargaining agreement at the Los Angeles plant it is clear that sever-

unequivocally requested reinstatement on behalf of all of the strikers employed at the Los Angeles plant. That Respondent Employer recognized this is evidenced by the fact that it felt obligated to give preferential treatment to the strikers when filing each vacant position which became available after the strike until the plant closed.

[14] The fact that the amount of a benefit is based, in part, on an employee's length of service does not mean that such benefit has "accrued," if other conditions to payment of the benefit are not satisfied. See, e.g., *Ace Beverage Co.*, 253 NLRB 951 (1980).

ance pay was not a benefit to which individuals became entitled simply on the basis of time worked or on their continuing legal status as employees. To the contrary, the contractual severance pay provision was purposefully limited for economic reasons to benefit only those employees who were laid off because of the three specific reasons within the control of the Employer. It was clearly not intended to benefit, nor was it applied to benefit, employees who were laid of in a general reduction-in-force not associated with one of the specific triggering events. Equally clear, it was not intended to benefit employees who were laid off at all, but who left the active payroll of the Employer under some other circumstances.

It is for the foregoing reasons that I am persuaded Respondent Employer's denial of severance pay to the unreinstated strikers was not a violation of the Act under the authority of *Knuth Bros.*, or related cases. Severance pay was not a benefit that had accrued to the unreinstated strikers at the time they commenced their strike against the Employer, nor did it accrue to them at any time thereafter. Severance pay was not lost by any employee simply as a consequence of his or her having engaged in the strike; it was lost because of a complex of economic factors that prevented the Employer from restoring production and employment to prestrike levels.[15]

In any event if the employees whose names appear on the preferential hiring list were entitled to an earned or accrued severance pay benefit, it does not follow for the reasons set forth below that Respondent Employer's failure to pay such a benefit to them constitutes a violation of Section 8(a)(1) of the Act.

In cases where a benefit of employment was extended to employees after a strike has effectively ended and where nonstriking employees generally have received the benefit, but strikers have not, the Board has held that the mischief of such a grant of benefits does not derive from the mere fact that some employees received the benefit while others were denied it, but upon the future impact of the action. E.g., *Aero-Motive Mfg.*, 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973). In the instant case the denial of severance pay can have no future impact. The Los Angeles plant was closed. There is no evidence in the record that any bargaining unit employee who worked at that plant is presently employed by the Employer, or that the unit presently exists.[16]

Nor is there any evidence that employees at other facilities of the Employer know or have reason to know that the Los Angeles plant was closed and/or that severance pay was paid to some, but not all of the employees who had been on the active payroll of the Employer when the strike commenced in September 1978. There is thus no evidence on which to base a conclusion that the particular circumstances surrounding the payment or nonpayment of severance pay to employees at the Los Angeles facility might have some impact on the willingness of employees at other facilities of the Employer to engage in protected activities in the future.

Under those circumstances, the Board's decision in *Tubular Products Co.*, 196 NLRB 886 (1972), is dispositive of the issue whether the Employer violated Section 8(a)(1) by virtue of its failure to pay severance pay to unreinstated strikers whose names appear on the preferential hiring list. In *Tubular Products*, the Board considered whether an employer violated Section 8(a)(1) and (3) of the Act by computing the severance pay that it voluntarily paid upon the closing of its plant in a manner that caused employees who had participated in a lengthy strike to receive less than employees who had not participated. The Board held that no such violation had occurred, for the simple reason that, because of the cessation of business, the employer's conduct "could have no future effect on its employees' exercise of statutory rights," 196 NLRB at 887.

The Board in *Tubular Products* went on to suggest that if the employer operated more than one facility, then the Board would have to consider the potential impact of the severance pay computation on employees at other plants, pursuant to the analytical scheme set forth in *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965). The record in this case, while clearly showing that the Employer does operate a large number of plants, is absolutely devoid of evidence that suggests that employees at other plants are even aware that the Los Angeles plant was closed, much less that severance pay was paid to some employees but not to others and the reasons therefor. Absent such evidence, there is no basis on which to conclude that the Employer's payments of severance pay upon the closing of its Los Angeles facility had any potential future impact on any employee, anywhere.

Based on the foregoing I shall recommend that the complaint against Respondent Employer in Case 21-CA-19926 be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The amended consolidated complaint is dismissed in its entirety.

[15] I note that to hold that it was illegal for Respondent Employer to deny severance pay to the strikers on the preferential hiring list would have the anomalous result of giving those individuals a right to severance pay superior to that of other strikers who did return to work, but were subsequently laid off through no fault of their own prior to the decision to close and who received no severance pay.

[16] I recognize that Resp. Exh. 18, the list of employees who did not receive severance pay, shows that there were three of these employees still working at the Los Angeles facility as of February 13, 1981. However, the circumstances of their continued employment—whether they were engaged in maintenance or other work connected with the closing of the plant—was not explored by the parties.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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